IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

Criminal Action No.
05-CR-446

LEO MUSE,

Defendant.

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SENTENCING MEMORANDUM OF THE UNITED STATES

I. INTRODUCTION

On April 23, 2007, pursuant to an Agreement between the parties, the Defendant, Leo Muse, entered a plea of guilty to Count 1 of Indictment 05-Cr-446 charging him with the felony offense of Conspiracy to Distribute and Possess with the Intent to Distribute Heroin , in violation of 21 U.S.C. § 846. The United States submits this Memorandum pursuant to the Uniform Presentence Order issued by the Court in anticipation of sentencing, which is scheduled for October 4, 2007.

This Memorandum addresses the Presentence Investigation Report and any objections or arguments relating to sentencing made by the Defendant to date. If the Court is considering a departure from the applicable U.S. Sentencing Guidelines range, or the imposition of a non-Guidelines sentence, on a ground not previously identified by the parties or in the Presentence

Investigation Report, the parties are entitled to notice and an opportunity to respond. *United States v. Anati*, 457 F.3d 233, 237 (2d Cir. 2006)

II. PLEA AGREEMENT

a. The Government will move pursuant to the provisions of § 3E1.1(b), United States Sentencing Guidelines, for a one level deduction because the defendant timely notified the United States Attorney's Office of his intention to plead guilty.

III. PRESENTENCE REPORT

A. Factual Findings

The United States adopts the facts set forth in the Presentence Investigation Report submitted by the United States Probation Office with the exception that the defendant was an organizer/leader of at last four individuals.

B. Calculation of the Sentencing Guidelines Range

The United States adopts the offense level computations, the criminal history score, and the resulting Sentencing Guidelines range set forth in the Presentence Investigation Report in all respects.

IV. MOTIONS, APPLICATIONS AND REQUESTS OF THE UNITED STATES

A. Motion for Additional Reduction for Acceptance of Responsibility

Pursuant to U.S.S.G. § 3E1.1(b), the United States moves for an additional (third) offense level reduction for "acceptance of responsibility." The Defendant timely notified the authorities of his intention to plead guilty, thereby permitting the U.S. Attorney's Office to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

B. Ex Parte Communications With The Court

The United States respectfully requests that the Court provide the parties with any ex parte communications received by the Court in connection with the sentencing in this case, with the exception of the confidential sentencing recommendations submitted by the United States Probation Office.

V. GOVERNMENT'S RECOMMENDATION WITHIN GUIDELINES RANGE

In determining a sentence consistent with the Supreme Court's guidance in *United States v. Booker,* 543 U.S. 220, 259-260 (2005), the Court must consider the Sentencing Guidelines, along with the other factors set forth in 18 U.S.C. § 3553(a). *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006). The Sentencing Reform Act

> requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," [18 U.S.C.] § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004). And the Act . . . requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (main ed. and Supp. 2004) * * *.

Booker, 543 U.S. at 259-260.

The government respectfully contends that a sentence of 135 months within the Guidelines range would be "sufficient, but not greater than necessary," to take into account all of the relevant sentencing factors. 18 U.S.C. § 3553(a) The defendant admits that he and his codefendant distributed the extremely addictive controlled substance heroin and that they made money . The defendant and his co-defendant utilized four other couriers to transport heroin from Newark, New Jersey to Syracuse for distribution. Also considering factors set forth in Title 18 United States Code

Section 3553, a sentence of incarceration is necessary to reflect the seriousness of the crime of distributing heroin; to deter others from trafficking in heroin; and to protect the public from the defendant who sold heroin over a lengthy period of time.

"[I]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006). Indeed, the Supreme Court has held that, on appeal, a within-Guidelines sentence may be presumed to be reasonable. *Rita v. United States*, __ U.S. __, 127 S. Ct. 2456 (2007). This is because "the sentencing statutes envision both the sentencing judge and the [Sentencing] Commission as carrying out the same basic § 3553(a) objectives." *Rita*, 127 S. Ct. at 2463. "An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general." *Id.* at 2465. Further, within-Guidelines sentences promote Congress's goal in enacting the Sentencing Reform Act -- "to diminish unwarranted sentencing disparity." *Rita*, 127 S. Ct. at 2467.

When an applicable Guidelines provision is dictated by statute, a sentencing court lacks authority to deviate based upon a policy disagreement. *See United States v. Castillo*, 460 F.3d 337, 355 (2d Cir. 2006) (district court may not impose non-Guidelines sentence based upon its disagreement with the Guidelines' crack to powder ratio which is dictated by statute). In other cases, although a sentencing court may lawfully impose a non-Guidelines sentence based upon a policy disagreement, such a deviation is not entitled to the same deference as a fact-based deviation. "[T]he Guidelines reflect Congress' judgment as to the appropriate national policy" for criminal offenses. *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006), *cert. denied,* __ U.S. __, 127 S. Ct. 1483

(2007). A non-Guidelines sentence "that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants" is "inherently suspect." *Rattoballi*, 452 F.3d at 133 (reliance on "indignity and ill-repute associated with criminal conviction," common to all convicted felons, is contrary to § 3553(a)(6), "which calls for a reduction in unwarranted disparities among similarly situated defendants").

Morever, the Second Circuit has held that a sentencing court cannot "import [its] own philosophy of sentencing if it is inconsistent with the § 3553(a) factors." *Rattoballi*, 452 F.3d at 132 (internal quotation marks and citation omitted). A sentence may be unreasonable if the court "relies on factors incompatible with the Commission's policy statements . . . in the absence of persuasive explanations as to why the sentence actually comports with the § 3553(a) factors." *Rattoballi*, 452 F.3d at 134, 135-36 (vacating a sentence of probation and home confinement as unreasonable when district court appeared to have overlooked or ignored policy statements that "make plain that imprisonment is generally warranted for antitrust offenders"). The government objects to the imposition of a sentence below the Guidelines range calculated in the Presentence Investigation Report. The record reveals no mitigating factors not adequately considered by the Sentencing Commission that would remove this case from the "mine-run" of similar cases, *see Rita*, 127 S. Ct. at 2465. Considering all of the factors set forth in 18 U.S.C. § 3553(a), a sentence within the Guidelines range in this particular case would be sufficient, but not greater than necessary, to comply with the sentencing purposes set forth in Section 3553(a)(2).

VI. PROCEDURAL REQUIREMENTS FOLLOWING *BOOKER*

A. Calculation of the Guidelines Range

The Court should calculate the Guidelines range "in the same manner as before *Booker.*" *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005), *citing United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.), *cert. denied*, 546 U.S. 876 (2005).

Prior to sentencing, the Court must resolve any material issues of fact, and must state its factual findings – by adoption of the Presentence Report or otherwise – on the record in a manner sufficient to permit appellate review. *See, e.g., United States v. Jeffers,* 329 F.3d 94, 101-02 (2d Cir. 2003); *United States v. Ben-Shimon,* 249 F.3d 98, 103 (2d Cir. 2001). The Court is authorized to make all factual determinations relating to the Sentencing Guidelines by a preponderance of the evidence, considering any reliable evidence, including hearsay. *See United States v. Gonzalez*, 407 F.3d 118, 125 (2d Cir. 2005) (the power of district judges to resolve disputed facts by a preponderance of the evidence at sentencing survives *Booker*); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005) (neither *Booker* nor *Crawford v. Washington*, 541 U.S. 36 (2004), bars judicial consideration of hearsay at sentencing), *cert. denied,* 546 U.S. 1117 (2006); *Crosby*, 397 F.3d at 112, 113. "A sentencing judge would . . . violate [18 U.S.C. §] 3553(a) by limiting consideration of the applicable Guidelines range to the facts found by the jury or admitted by the defendant, instead of considering the applicable Guidelines range, as required by subsection 3553(a)(4), based on the facts found by the court." *Crosby,* 397 F.3d at 115.

B. Consideration of the Sentencing Guidelines and the § 3553(a) Factors

Although the Sentencing Guidelines are no longer mandatory, "*Booker* did not signal a return to wholly discretionary sentencing." *Rattoballi*, 452 F.3d at 132. The Second Circuit has cautioned:

> [I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in section 3553(a). We have every confidence that the judges of this Circuit will do so, and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice.

Crosby, 397 F.3d at 113-114.

The Guidelines range is the "starting point" for a sentence (*Anati*, 457 F.3d at 237), and is "a benchmark or point of reference or departure for the review of sentences." *Rattoballi*, 452 F.3d at 133. The Guidelines, which were fashioned after careful consideration of the other § 3553(a) factors, "cannot be called just another factor in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges." *Rattobolli*, 452 F.3d at 133 (citations and internal quotation marks omitted).

C. Statement of Reasons for the Sentence

Section 3553(c) requires the district court, "at the time of sentencing," to "state in open court the reasons for its imposition of the particular sentence." "[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require a lengthy explanation." *Rita*, 127 S. Ct. at 2469. Still, "[w]here a prosecutor or defendant presents non-frivolous reasons for imposing a different sentence, . . . the judge will normally . . . explain why he has rejected those arguments." *Id.*

Greater specificity is required for: (1) sentences within a Guidelines range that exceeds 24 months – for which the court must state "the reason for imposing a sentence at a particular point within the range" (18 U.S.C. § 3553(c)(1)); and (2) sentences outside the Guidelines range – for which the court must state orally and in the written judgment "the specific reason" for the imposition of the sentence (18 U.S.C. § 3553(c)(2)). *See*, *e.g.*, *United States v. Lewis*, 424 F.3d 239, 249 (2d Cir. 2005) (remanding because, in imposing a sentence for supervised release violation, the district court failed to state sufficient reasons for imposing a sentence outside the range recommended by Guidelines policy statements); *United States v. Goffi*, 446 F.3d 319, 321-22 (2d Cir. 2006) (remanding for the district court to amend the written judgment to state the specific reason for the imposition of a sentence outside of the policy statement for a probation violation).

When a sentence deviates significantly from the Guidelines, and the judge has not made a compelling statement of reasons, the Second Circuit "may be forced to vacate" if "the record is insufficient, on its own, to support the sentence as reasonable." *Rattoballi*, 452 F.3d at 135.

> Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.

Rita, 127 S. Ct. 2468.

VII. GOVERNMENT'S POSITION REGARDING REMAND

Pursuant to the provisions of 18 U.S.C. § 3143(b), the United States respectfully moves the Court for an order directing remand of the Defendant immediately after sentence. The Defendant has long been aware of his impending sentencing, he faces a significant term of imprisonment under the applicable Guidelines, and his attorney has not raised any substantial question of law or fact likely to form a viable basis for an appeal.

III. CONCLUSION

The United States respectfully contends that the recommended sentence of 135 months is the most appropriate, because it is "sufficient, but not greater than necessary" to achieve the goals of sentencing.

Dated: September 20, 2007

Respectfully submitted,

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